Supreme Court, U.S.
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No. 94-1047

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

DAN A. MORGENSTERN, M.D.,

Petitioner,

v.

CHARLES S. WILSON, M.D., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether orders that explicitly grant injunctions must satisfy the additional requirements for appealability under 28 U.S.C. § 1292(a)(1) set forth in *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981).

2. Whether the order in this case "grant[ed]" an injunction within the meaning of Section 1292(a)(1).

3. Whether the Seventh Amendment prevents federal courts from setting aside factually unsupported jury verdicts.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Eighth Circuit were petitioner Dan A. Morgenstern, M.D. and respondents Michael A. Breiner, M.D., Robert J. Buchman, M.D., Stephen W. Carveth, M.D., Christopher C. Caudill, M.D., Alan D. Forker, M.D., Deepak M. Gangahar, M.D., Joseph R. Gard, M.D., Sabyasachi Mahapatra, M.D., Nebraska Heart Institute, P.C. ("NHI"), Herbert E. Reese, M.D., Walt F. Weaver, M.D., and Charles S. Wilson, M.D. The parties to the proceedings in the United States District Court for the District of Nebraska also included Cardiology Consultants, P.C. ("CCPC") and Cardiovascular & Thoracic Surgery, P.C. ("CVTS"), neither of which was a party to the Eighth Circuit proceedings.

Respondent NHI, which is wholly owned by thirteen individual physicians, has no parent companies or subsidiaries. CCPC and CVTS are also wholly owned by individual physicians, and neither corporation holds any subsidiaries. All other parties to the proceedings are individual physicians.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES iv

STATEMENT 1

REASONS FOR DENYING THE WRIT 4

A. *CARSON* DOES NOT APPLY TO ORDERS THAT EXPLICITLY GRANT OR DENY INJUNCTIONS 5

B. THE ORDER IN THIS CASE EXPLICITLY GRANTED AN INJUNCTION 10

C. THE SEVENTH AMENDMENT DOES NOT PREVENT FEDERAL COURTS FROM SETTING ASIDE FACTUALLY UNSUPPORTED JURY VERDICTS 13

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, S.A., 875 F.2d 1174 (5th Cir. 1989), *cert. denied*, 493 U.S. 1075 (1990) 7
Brown v. Kerr-McGee Chemical Corp., 767 F.2d 1234 (7th Cir. 1985), *cert. denied*, 475 U.S. 1066 (1986) . . 6, 7
Budinich v. Becton Dickinson & Co., 486 U.S. 196 (1988) 9
Cable Holdings of Battlefield, Inc. v. Cooke, 764 F.2d 1466 (11th Cir. 1985) 6
Carson v. American Brands, Inc., 450 U.S. 79 (1981) 2, 5, 7, 9
Casey v. Planned Parenthood, 14 F.3d 848 (3d Cir. 1994) 7
Chronicle Publishing Co. v. Hantzis, 902 F.2d 1028 (1st Cir. 1990) 8
Cohen v. Board of Trustees of Univ. of Medicine, 867 F.2d 1455 (3d Cir. 1989) (in banc) 6, 7, 12
Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 9
EEOC v. Kerrville Bus Co., 925 F.2d 129 (5th Cir. 1991) 7
E.P. Hinkel & Co. v. Manhattan Co., 506 F.2d 201 (D.C. Cir. 1974) 3
Frutiger v. Hamilton Central School Dist., 928 F.2d 68 (2d Cir. 1991) 8
Galloway v. United States, 319 U.S. 372 (1943) 13
Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478 (1978) 9
Gould v. Control Laser Corp., 650 F.2d 617 (5th Cir. 1981) 6

TABLE OF AUTHORITIES (Cont'd.)

Page

Graff v. City of Chicago, 986 F.2d 1055 (7th Cir.), *vacated on other grounds*, No. 92-2352 (April 15, 1993), *jurisdictional holding reinstated*, 9 F.3d 1309 (7th Cir. 1993) (en banc), *cert. denied*, 114 S. Ct. 1837 (1994) 7
Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988) 9
Hedberg v. State Farm Mut. Auto. Ins. Co., 350 F.2d 924 (8th Cir. 1965) 4
Hinton v. Department of Justice, 844 F.2d 126 (3d Cir. 1988) 8
Holmes v. Fisher, 854 F.2d 229 (7th Cir. 1988) 6, 7, 10
International Ass'n of Machinists & Aerospace Workers v. Eastern Airlines, 849 F.2d 1481 (D.C. Cir. 1988) 5
Justin Indus. v. Choctaw Securities, 920 F.2d 262 (5th Cir. 1990) (per curiam) 7
Kausler v. Campey, 989 F.2d 296 (8th Cir. 1993) 3
Lewis v. Tobacco Workers Int'l Union, 577 F.2d 1135 (4th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979) . . . 12
Live and Let Live, Inc. v. Carlsberg Mobile Home Properties, Ltd.-'73, 592 F.2d 846 (5th Cir. 1979) 11
Ross v. Zavarella, 916 F.2d 898 (3d Cir. 1990) 7
Sherri A.D. v. Kirby, 975 F.2d 193 (5th Cir. 1992) 6, 7
Smith v. Vulcan Iron Works, 165 U.S. 518 (1897) 3
South Bend Consumers Club, Inc. v. United Consumers Club, Inc., 742 F.2d 392 (7th Cir. 1984) 6
Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370 (1987) 9
Switzerland Cheese Ass'n v. E. Horne's Market, Inc., 385 U.S. 23 (1966) 6, 9
Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc., 874 F.2d 1346 (10th Cir. 1989) 6
United States v. Bayshore Assocs., 934 F.2d 1391 (6th Cir. 1991) 6
United States v. RMI Co., 661 F.2d 279 (3d Cir. 1981) . . . 6

TABLE OF AUTHORITIES (Cont'd.)

Page

Van Cauwenberghe v. Biard, 486 U.S. 517 (1988) 10
Williams Electronics, Inc. v. Artic Int'l, Inc.,
685 F.2d 870 (3d Cir. 1982) 8

STATUTES AND RULES

15 U.S.C. § 2 (1988 & Supp. II 1990) 2
15 U.S.C. § 26 (1988) 11
28 U.S.C. § 1291 (1988) 11
28 U.S.C. § 1292(a)(1) (1988) . . . . . *passim*
Fed. R. Civ. P. 62(a) 11

MISCELLANEOUS AUTHORITY

9 J. Moore & B. Ward, *Moore's Federal Practice*
(2d ed. 1994) 4, 6
16 C. Wright, A. Miller, E. Cooper & E. Gressman,
Federal Practice and Procedure (1977) 6
16 C. Wright, A. Miller, & E. Cooper, *Federal Practice*
and Procedure (Supp. 1994) 10

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT

Despite the complex and protracted antitrust litigation conducted below, this case now presents only two narrow questions regarding the interlocutory appealability of an injunction and one frivolous question regarding the constitutionality of setting aside a factually unsupported jury verdict.

Respondents are six cardiologists, five surgeons and the Nebraska Heart Institute, P.C. ("NHI"). At all times relevant to this case, the cardiologists and surgeons were engaged in separate group medical practices in Lincoln, Nebraska. These physicians created NHI to provide administrative, clinical and marketing services to their respective practices, Cardiology Consultants, P.C. ("CCPC") and Cardiovascular & Thoracic Surgery, P.C. ("CVTS"). Pet. App. 2-3.

In 1987, petitioner began employment as a surgeon with CVTS. After he failed to make partner there, petitioner opened a competing surgery practice in Lincoln, which attracted virtually no cardiac patients. Petitioner then filed a lawsuit against the eleven physicians, CCPC, CVTS and NHI, seeking injunctive relief and damages based on the physicians' allegedly unlawful acts of forming NHI and not recommending petitioner to patients in need of cardiac surgery. Pet. App. 3, 44.

A jury exonerated CCPC and CVTS of all liability, but concluded that respondents had monopolized a market for adult cardiac surgery, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. In finding that respondents possessed monopoly power within a relevant geographic market, the jury defined that market to include Lincoln and 26 surrounding counties "extending in certain directions over 200 miles beyond Lincoln" (Pet. App. 9), but to exclude Omaha, Nebraska, which is only "fifty-eight miles by main highway" from Lincoln (Pet. App. 11). The jury fixed damages, before trebling, at $1,467,000. Pet. App. 45. The District Court, however, granted respondents a new trial on damages. Pet. App. 25-30.

At the same time, the District Court entered an "Order For Injunctive Relief." Pet. App. 35. That order "permanently enjoined" respondents to dissolve or restructure the ownership of NHI "within sixty (60) days after this order becomes final following completion of the appellate process." Pet. App. 35-36. The order explained that its "injunctive relief" was "done for the reason that the jury under proper instructions found on the monopolization claim for the plaintiff." Pet. App. 36. Respondents sought interlocutory review of the injunction, and petitioner moved to dismiss the appeal as premature.

The Court of Appeals denied petitioner's motion to dismiss.[1] First, the court addressed the scope of this Court's decision in *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), which

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[1] The court's opinion is reported at 29 F.3d 1291 (8th Cir. 1994).

held that orders with "the practical effect of refusing an injunction" are not interlocutorily appealable under 28 U.S.C. § 1292(a)(1) unless they also "have a 'serious, perhaps irreparable, consequence'" and "can be 'effectively challenged' only by immediate appeal." *Id.* at 84. The Court of Appeals explained that *Carson* creates "two separate avenues of analysis" under Section 1292(a)(1). Pet. App. 5. On the one hand, the court held, "if an interlocutory order expressly grants or denies a request for injunctive relief, the *Carson* requirements need not be met and the order is immediately appealable as of right under § 1292(a)(1)." Pet. App. 6. "By contrast, if an order merely has the practical effect of granting or denying an injunction, the *Carson* irreparable injury test must be satisfied." *Id.*

Next, the Court of Appeals held that the Order For Injunctive Relief explicitly "grant[ed]" an injunction within the meaning of Section 1292(a)(1). The court carefully considered "'the language of the order, the grounds on which it rests, [and] the circumstances in which it was entered.'" Pet. App. 6 (quoting *Kausler v. Campey*, 989 F.2d 296, 299 (8th Cir. 1993)). The court noted that the Order For Injunctive Relief, which by its terms "permanently enjoined" respondents to dissolve or restructure NHI (Pet. App. 35), "expressly granted the specific injunctive relief prayed for in Morgenstern's complaint." Pet. App. 6-7. Moreover, the court explained that the timing provision in the order, which created no doubt about the existence or scope of the "affirmative obligation" that the District Court had imposed on respondents, simply "stayed that obligation pending appellate review." Pet. App. 7.

On the merits, the Court of Appeals held that the injunction was infirm because there was insufficient evidence to support the underlying determination of monopolization liability.[2] The court

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[2] Petitioner does not dispute that a court of appeals properly reviewing an injunction also may review any finding of liability on which the injunction is based. *See, e.g., Smith v. Vulcan Iron Works*, 165 U.S. 518, 525 (1897); *E.P. Hinkel & Co. v. Manhattan Co.*, 506 F.2d 201,

began with several undisputed propositions: first, a plaintiff must prove that the defendant possessed monopoly power within a well-defined geographic market; second, a geographic market encompasses areas "to which consumers can practicably turn for alternative sources of the product"; third, respondents' share of the relevant market would be only thirty percent if Omaha had been included in it; and fourth, a thirty percent share cannot, as a matter of law, support a finding of monopoly power. Pet. App. 8-10 & n.3.

The Court of Appeals then found insufficient evidence to support the definition of a geographic market that included Lincoln but not Omaha. The court explained that petitioner's evidence addressed the legally irrelevant question of where patients "*actually* went, as opposed to where they *could* practicably go, for their cardiac surgery services." Pet. App. 11 (emphases in original). Moreover, the court noted the implausibility of supposing that "fifty-eight miles by main highway" is a competitively significant distance for consumers of cardiac surgery services, especially when petitioner himself regularly traveled that distance to provide such services. Pet. App. 11-12. Finally, the court carefully reviewed the "overwhelming" affirmative evidence that Lincoln and Omaha occupy the same market, including the testimony of "health care providers in various professions throughout Nebraska" (who "uniformly confirmed the existence of vigorous competition between Lincoln and Omaha") and the testimony of respondents' expert (who provided "further corroborative evidence" in the form of economic studies specifically designed to measure practicable alternative suppliers). Pet. App. 12-13.

REASONS FOR DENYING THE WRIT

In pertinent part, 28 U.S.C. § 1292(a)(1) vests the courts of appeals with jurisdiction to review, before final judgment, district

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204 (D.C. Cir. 1974); *Hedberg v. State Farm Mut. Auto. Ins. Co.*, 350 F.2d 924, 933 (8th Cir. 1965) (Blackmun, J.); 9 J. Moore & B. Ward, *Moore's Federal Practice* ¶ 110.25[1], at 289-90 (2d ed. 1994).

court orders "granting, continuing, modifying, refusing or dissolving injunctions."[3] Petitioner provides no reason why this Court should reconsider the Court of Appeals' straightforward determination that the Order For Injunctive Relief was interlocutorily appealable under Section 1292(a)(1).

A. *CARSON* DOES NOT APPLY TO ORDERS THAT EXPLICITLY GRANT OR DENY INJUNCTIONS

In *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981), this Court held that orders with "the practical effect of refusing an injunction" are not interlocutorily appealable as injunctions unless they also inflict serious consequences and cannot be challenged effectively upon final judgment. Petitioner invites the Court to consider whether these requirements should be extended to orders, like the one at issue here, that grant or deny injunctions explicitly. Pet. 15-18. For several reasons, the Court should decline petitioner's invitation.

1. The lower courts are in widespread agreement that orders explicitly granting or denying injunctions fall squarely within the plain meaning of Section 1292(a)(1), and thus need not satisfy the additional *Carson* requirements for appealability. In holding that *Carson* does not apply "if an interlocutory order expressly grants or denies a request for injunctive relief" (Pet. App. 6), the Eighth Circuit followed at least seven other United States Courts of Appeals that have endorsed an identical rule. *See International Ass'n of Machinists & Aerospace Workers v. Eastern Airlines*,

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[3] Section 1292(a) provides that "the courts of appeals shall have jurisdiction of appeals from"

> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

849 F.2d 1481, 1486 n.11 (D.C. Cir. 1988); *Cohen v. Board of Trustees of Univ. of Medicine*, 867 F.2d 1455, 1466 (3d Cir. 1989) (in banc); *Sherri A.D. v. Kirby*, 975 F.2d 193, 203 & n.14 (5th Cir. 1992); *United States v. Bayshore Assocs.*, 934 F.2d 1391, 1395-96 (6th Cir. 1991); *Holmes v. Fisher*, 854 F.2d 229, 231-32 (7th Cir. 1988); *Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc.*, 874 F.2d 1346, 1351 (10th Cir. 1989); *Cable Holdings of Battlefield, Inc. v. Cooke*, 764 F.2d 1466, 1471 (11th Cir. 1985).[4]

Ignoring all of this authority, and relying almost exclusively on dicta contained in a single decision, *Brown v. Kerr-McGee Chemical Corp.*, 767 F.2d 1234 (7th Cir. 1985), *cert. denied*, 475 U.S. 1066 (1986), petitioner contends that the lower courts are divided. Pet. 13-15. But as petitioner quietly acknowledges (Pet. 14 n.8), *Brown* itself did not address any question about which orders must satisfy *Carson* requirements in order to be interlocutorily appealable. *See* 767 F.2d at 1239.

Moreover, the Third, Fifth and Seventh Circuit decisions that *Brown* described as having extended *Carson* to "all appeals under section 1292(a)(1)" (*id.* at 1238) in fact did no such thing. Each case merely applied *Carson* to orders granting defendants partial summary judgment on claims seeking equitable relief.[5] Under *Switzerland Cheese Association v. E. Horne's Market, Inc.*, 385 U.S. 23 (1966), these summary judgment orders grant or deny

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[4] *See also* 9 J. Moore & B. Ward, *Moore's Federal Practice* ¶ 110.20[1], at 227 ("*Carson* has been read to leave unaffected cases that come within the text of the statute, that is those that actually grant or refuse an injunction."); 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3924, at 67 (1977) ("Interlocutory orders that grant permanent injunctions also are easily reached [by Section 1292(a)(1)].").

[5] *See United States v. RMI Co.*, 661 F.2d 279, 279-82 (3d Cir. 1981); *Gould v. Control Laser Corp.*, 650 F.2d 617, 618-21 (5th Cir. 1981); *South Bend Consumers Club, Inc. v. United Consumers Club, Inc.*, 742 F.2d 392, 393-94 (7th Cir. 1984).

injunctions only in their "practical effect." *See Carson*, 450 U.S. at 84-85.

Finally, even if the "disagreement" incorrectly alleged in *Brown* (767 F.2d at 1238) would have justified review eight years ago (*but see* 475 U.S. 1066 (denying certiorari)), subsequent decisions have removed any possible confusion about the proper scope of *Carson*. In *Cohen*, for example, the Third Circuit, sitting in banc, unanimously held that *Carson* casts no doubt upon "[t]he appealability of grants of injunctive orders in whatever form." 867 F.2d at 1466.[6] In *Sherri*, the Fifth Circuit reaffirmed its numerous recent holdings that "[o]rders which explicitly grant or deny injunctive relief are immediately appealable as of right" and that "no additional finding of a threat of immediate, irreparable injury is required." 975 F.2d at 203.[7] And in *Holmes*, the Seventh Circuit held that *Carson* does not apply to orders that grant or deny injunctions "plainly." 854 F.2d at 231-32.[8]

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[6] The Third Circuit subsequently extended *Carson* to all orders *denying* injunctions, whether explicitly or in practical effect. *See Ross v. Zavarella*, 916 F.2d 898, 902 (3d Cir. 1990). Recently, however, that court has reaffirmed its position that *Carson* does not apply to orders explicitly *granting* injunctions. *See Casey v. Planned Parenthood*, 14 F.3d 848, 855 (3d Cir. 1994). This case, of course, involves only the latter kind of order.

[7] *See also EEOC v. Kerrville Bus Co.*, 925 F.2d 129, 131-32 (5th Cir. 1991); *Justin Indus. v. Choctaw Securities*, 920 F.2d 262, 265-66 n.2 (5th Cir. 1990) (per curiam); *Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, S.A.*, 875 F.2d 1174, 1176 (5th Cir. 1989), *cert. denied*, 493 U.S. 1075 (1990).

[8] *See also Graff v. City of Chicago*, 986 F.2d 1055, 1059-60 (7th Cir.) (holding *Carson* inapplicable "because this is not a practical effect case"), *vacated on other grounds*, No. 92-2352 (April 15, 1993), *jurisdictional holding reinstated*, 9 F.3d 1309, 1313 (7th Cir. 1993) (en banc), *cert. denied*, 114 S. Ct. 1837 (1994).

Petitioner also suggests that the question answered by these cases (whether *Carson* applies to orders that explicitly grant or deny injunctions) is distinct from the question discussed in *Brown* (whether *Carson* applies to orders that address the merits). Pet. 12-18. The Court of Appeals, however, held only that *Carson* does not apply to orders that grant or deny injunctions "expressly," rather than in "practical effect." Pet. App. 6. Thus, to the extent that *Brown* raises a distinct question whether *Carson* applies to orders that address the merits but do not grant or deny injunctions expressly, that question is simply not presented in this case.[9]

Moreover, the distinction urged by petitioner is fatal to any allegation of a *relevant* split of authority, since petitioner cites no case other than *Brown* that is even colorably inconsistent with the Court of Appeals' decision. In his entire discussion of what petitioner characterizes as the "practical effect" question as opposed to the "merits" question (Pet. App. 15-17), petitioner cites only *Williams Electronics, Inc. v. Artic International, Inc.*, 685 F.2d 870 (3d Cir. 1982). But the injunction granted in *Williams* was explicit, addressed the merits, and inflicted serious, perhaps irreparable consequences. *See id.* at 871. Thus, the jurisdictional question was entirely "'routine,'" and the court reviewed the injunction without discussion of any *Carson* issue. *Id.* (citation omitted).

2. Petitioner's proposed extension of *Carson* is also inconsistent with both the plain language of Section 1292(a)(1) and the decisions of this Court. By its terms, Section 1292(a)(1) provides interlocutory appellate jurisdiction over *all* orders

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[9] It is unclear whether these questions are as distinct as petitioner suggests. An order explicitly granting an injunction necessarily must address the merits, since an "injunction" by definition provides relief on the merits. *See, e.g., Frutiger v. Hamilton Central School Dist.*, 928 F.2d 68, 72 (2d Cir. 1991); *Chronicle Publishing Co. v. Hantzis*, 902 F.2d 1028, 1030 (1st Cir. 1990); *Hinton v. Department of Justice*, 844 F.2d 126, 130 (3d Cir. 1988).

"granting [or] refusing . . . injunctions." Frequently, this Court has considered the appropriateness of extending the statute to orders that do not themselves grant or refuse injunctions, but that have the same practical effect as orders that do. *See, e.g., Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 379 (1987) (order denying motion for intervention of right); *Carson*, 450 U.S. at 83-86 (order denying motion to enter consent decree); *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 480-82 (1978) (order denying motion for class certification); *Switzerland Cheese*, 385 U.S. at 24-25 (order denying motion for summary judgment). While the irreparable injury requirements provide necessary restrictions on the *extension* of Section 1292(a)(1) to such "practical effect" injunctions (*see, e.g., Carson*, 450 U.S. at 83-84), this Court has never asserted that orders actually "granting . . . injunctions" also must satisfy these same requirements.

In *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988), the Court confirmed this straightforward understanding of *Carson*. *Gulfstream* stressed that Section 1292(a)(1) provides jurisdiction over *two* categories of orders: "orders that grant or deny injunctions *and* orders that have the practical effect of granting or denying injunctions and have '"serious, perhaps irreparable, consequence."'" *Id.* at 287-88 (quoting *Carson*, 450 U.S. at 84) (emphasis added). Petitioner's objections notwithstanding (Pet. 16 n.9), *Gulfstream* makes perfectly clear that "orders that grant or deny injunctions" are interlocutorily appealable regardless of whether they satisfy *Carson*'s irreparable injury requirements.

3. Finally, petitioner's proposed extension of *Carson* is profoundly unwise even as a policy matter. Petitioner reasons that because Section 1292(a)(1) provides interlocutory review over a class of orders that often can inflict irreparable injuries, the jurisdictional determination *in each case* must turn on irreparable injury. Pet. 17-18. But this Court often has warned of the debilitating effect of rules of appellate jurisdiction that are either unclear (*see, e.g., Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03 (1988)), factbound (*see, e.g., Coopers & Lybrand v.*

Livesay, 437 U.S. 463, 473-74 (1978)), or related to the merits of a dispute (*see, e.g., Van Cauwenberghe v. Biard*, 486 U.S. 517, 527-28 (1988)). Petitioner's irreparable injury requirement, if universally applied, would be all of the above.

Many have noted the folly of petitioner's proposed approach. Judge Easterbrook perhaps explained it best (in the context of orders denying injunctions):

> Section 1292(a)(1) is decently plain: all interlocutory orders denying injunctions are appealable. There may be difficult questions, as in *Carson*, whether a given decision *is* an interlocutory order denying an injunction, and it makes sense in characterizing an ambiguous order to determine whether it has the attributes that usually accompany the grant or denial of injunctions, attributes that led Congress to enact § 1292(a)(1). The process of characterization cannot be allowed to feed back into the propriety of an appeal from an order that is unquestionably an injunction. To do so would not only alter the operation of the statute but also allow the methods used to resolve borderline cases to dominate the center of the spectrum, driving out all vestiges of certainty. . . . [A]n appellate court should be able to accept or reject the appeal without squandering on jurisdictional matters time needed to decide the case on the merits. . . . Asking whether an order plainly denying an injunction *also* caused irreparable injury would add a gratuitously complicating factor to the simple statutory rule.

Holmes, 854 F.2d at 231-32 (emphases in original). *See also* 16 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3924, at 84 (Supp. 1994) ("[A]n open-ended interpretation of § 1292(a)(1) according to a sense of the policy of the final judgment rule and its exceptions invites chaos.").

B. THE ORDER IN THIS CASE EXPLICITLY GRANTED AN INJUNCTION

The Court of Appeals correctly concluded that the Order For Injunctive Relief "grant[ed]" an injunction within the meaning of

Section 1292(a)(1). The order invoked "the equitable powers of the court under 15 U.S.C. § 26." Pet. App. 35.[10] It began with the imperative "IT IS ORDERED that." *Id.* By its terms, it "permanently enjoined" respondents to dissolve or radically restructure NHI -- a central component of the relief sought by petitioner from the outset of this lawsuit. Pet. App. 35-36. The order was entirely self-executing, and it imposed on respondents obligations that were clear, fixed and absolute.

Petitioner, however, contends that the order could not have "grant[ed]" an injunction because respondents need not have complied with it until "sixty (60) days after . . . completion of the appellate process." Pet. App. 35. While not disputing the Court of Appeals' assertion that this timing provision simply imposed a stay pending appeal, petitioner argues that "an order which has been stayed" cannot support interlocutory appellate jurisdiction. Pet. 8 n.5.

Petitioner provides no support, however, for the startling proposition that a stay pending appeal destroys interlocutory appealability. The Federal Rules of Civil Procedure explicitly contemplate otherwise. *See* Fed. R. Civ. P. 62(a) ("Unless otherwise ordered by the court, an *interlocutory* or final judgment in an action for an injunction . . . shall not be stayed . . . during the pendency of an appeal." (emphasis added)). Petitioner relies on a single case holding that a stay of execution, pending consideration of post-trial motions, prevents a judgment from becoming "final" within the meaning of 28 U.S.C. § 1291. *See Live and Let Live, Inc. v. Carlsberg Mobile Home Properties, Ltd.-'73*, 592 F.2d 846, 848 (5th Cir. 1979). That case is hardly "analogous" (Pet. 8 n.5) to this one, however, for the whole point

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[10] Section 26 provides, in pertinent part, that "[a]ny person, firm, corporation or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws."

of Section 1292 is to make certain *non*-final orders *interlocutorily* appealable.

Petitioner also reads *Cohen* as holding that an order cannot "gran[t]" an injunction unless it is *immediately* enforceable by contempt. Pet. 10. In language stressed by petitioner, *Cohen* described immediately enforceable injunctions as but one example of "explicit" injunctions not subject to *Carson* requirements. *See* 867 F.2d at 1466. As another example, however, the court cited orders that "expressly" rule on motions for preliminary injunctions. *Id.* Regardless of questions about irreparable injury or immediate enforceability, the court held, "there is no difficulty in identifying [these orders] as falling within section 1292(a)(1)." *Id.* The same reasoning applies to orders that "expressly" rule on motions for *permanent* injunctions, because as *Cohen* itself explained (*id.* at 1464 n.7), Section 1292(a)(1) makes no distinction between preliminary and permanent injunctions.

Finally, petitioner seeks to extract a similar rule from *Lewis v. Tobacco Workers International Union*, 577 F.2d 1135 (4th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979). Pet. 10-11. *Lewis*, however, merely held that an injunction "requiring present affirmative action" was interlocutorily appealable. *See* 577 F.2d at 1139. Nothing in *Lewis* suggests that injunctions not requiring "present" action are *ipso facto* not appealable.

At bottom, petitioner's challenge does not rest on any rule of law adopted in *Live and Let Live*, *Cohen* or *Lewis*, but on the Court of Appeals' factbound application of the "granting" requirement of Section 1292(a)(1) to the injunction at issue in this case. In applying that requirement, the Court of Appeals carefully considered "'the language of the order, the grounds on which it rests, [and] the circumstances in which it was entered.'" Pet. App. 6 (citation omitted). Petitioner has failed to establish either that the court applied the "granting" requirement incorrectly or that, even if it did, this Court should review such a narrow and factbound determination.

C. THE SEVENTH AMENDMENT DOES NOT PREVENT FEDERAL COURTS FROM SETTING ASIDE FACTUALLY UNSUPPORTED JURY VERDICTS

Finally, petitioner argues that the Court of Appeals violated the Seventh Amendment by setting aside a factually unsupported jury verdict. Pet. 18-24. That contention is transparently without merit. *See, e.g., Galloway v. United States*, 319 U.S. 372, 389 (1943) ("If the intention is to claim generally that the [Seventh] Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century.").

To the extent that petitioner also challenges the sufficiency determination made by the Court of Appeals in this case (Pet. 18-21), his claim plainly does not warrant this Court's review. And, as even a cursory review of the opinion below confirms, it too is without merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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